No. 3902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID TAYLOR, *Appellant,* vs. NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a corporation), TUNGSTEN PRODUCTS COMPANY (a corporation), MILL CITY DEVELOPMENT COMPANY (a corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, individually, *Appellees.*	}

REPLY BRIEF FOR APPELLEE W. J. LORING.

JOHN F. DAVIS,
CHARLES S. WHEELER, JR.,
Attorneys for Appellee W. J. Loring.

FILED
DEC 5 - 1923

INDEX

	Pages
Opinion of trial judge	2 32
Appellant's position on the appeal record	32 35
Appellant's reply brief incorrectly states Loring's position	35 48
Failure of appellant's reply brief to show evidence, misrepresentations, correspondent allegations of fraud set forth in pleadings	49 55
a. No proper basis laid for comparison of results obtained by pannings and those obtained by Bancroft	49 51
b. Tonnage development not an inducing cause	51 55
Appellant has plain, speedy and adequate remedy in the ordinary course of law	55 56
Taylor's demand unconscionable	57 58
Conclusion	59

No. 3902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID TAYLOR,

Appellant,

vs.

NEVADA HUMBOLDT TUNGSTEN MINES COMPANY (a corporation), TUNGSTEN PRODUCTS COMPANY (a corporation), MILL CITY DEVELOPMENT COMPANY (a corporation), W. J. LORING, C. W. POOLE, R. NENZEL, H. J. MURRISH, L. A. FRIEDMAN, C. H. JONES, G. K. HINCH, J. T. GOODIN, V. A. TWIGG, J. C. HUNTINGTON and LENA J. FRIEDMAN, individually,

Appellees.

REPLY BRIEF FOR APPELLEE W. J. LORING.

Appellee W. J. Loring respectfully requests permission to file this closing brief in answer to some of the contentions of appellant presented in his reply brief, feeling it may aid the Court in the consideration of the matter therein presented, particularly in view of the fact that it did not have the opportunity of the Trial Court in the matter of hearing the evidence.

Opinion of the Trial Judge.

The opinion of the trial judge contains an able, exhaustive, and painstaking review of the evidence taken in open Court, and, therefore, necessarily contains a large number of references to the Transcript, but the numbers of the pages of the typewritten Transcript do not, of course, conform to the corresponding pages of the printed record. As this appeal Court is without any copies of the typewritten Transcript, this Court, in case it should desire to read any of said evidence referred to in the opinion, would be without any guide to the pages referred to. In order to supply the Court with the information lacking in this regard in the printed record, the opinion is here reprinted, and wherever the Judge has made reference to a page of the typewritten Transcript, the corresponding page of the printed record is inserted in brackets, next thereto, as follows (italics and interpolations in brackets are ours):

FARRINGTON, District Judge:

Throughout this decision the different corporations will be designated as Tungsten Company, Products Company and Development Company respectively.

January 16, 1919, plaintiff Taylor and the two defendants, Tungsten Company and Products Company, entered into a contract, a copy of which is attached to the complaint, in which Taylor agreed to advance $100,000, and the two companies engaged to

deliver to him at specified dates 170 tons of scheelite concentrates of certain guaranteed qualities. On the same day the defendants Friedman, Poole, Nenzel, Jones, Murrish, Hinch, Huntington, Goodin, Twigg and Lena Friedman, granted Taylor an option on all their interest in the three corporations for a total purchase price of $498,400, agreeing that all debts and obligations of the said companies should be satisfied out of the purchase money, and that the option should be good up to and including July 16, 1919. Later, and on the same day, January 16, 1919, Taylor, B. D. Thane and Howland Bancroft signed a writing, in which it was stated they mutually agreed that Taylor should use his best endeavors to carry out the terms of the option, make a sale of the property, and in the event of success, the profits should be divided, 60 per cent to Taylor, 20 per cent to Thane, and 20 per cent to Bancroft. Thane released all his claims to Taylor under this contract September 11, 1920. Bancroft's interest was understood to be in payment for his professional services. He retained it until March 29, 1920, and was otherwise compensated, because he "refused to testify as an expert for anybody as an interested party." (Transcript, p. 197.) [Record, p. 261.]

Beginning on the following day, January 17th, Bancroft made a ten-days' examination of the mine, and on February 15th reported as blocked out 8,111 tons of ore averaging 1.75 per cent W03; and two thousand to three thousand tons unsampled. His

conclusion was that "From many viewpoints the property is one of the most favorably situated tungsten mines in the United States. It is one of the few containing an ore-body which is commercial under pre-war market prices for this product and present high prices [of] labor, supply and material conditions. At a market price of $6.25 per unit, treating 100 tons of ore per day with an 80% recovery, tungsten ore from this ore body will pay expenses if it runs 1% W03. (As previously stated, the average tenor of the 8111 tons of indicated ore is 1.75% W03. The average market price of tungsten trioxide for 10 years prior to the war was $6.93 per unit.)"

February 24th Taylor wrote there was no chance of interesting anybody in the purchase of the property at a half million dollar price, and suggested that the best thing to do all around was to close down the mine. After considerable correspondence relative to modifying the option, Poole, Nenzel and Murrish, representing stockholders, proceeded to Denver, arriving Sunday, March 30th. April 2d a new agreement was executed, a copy of which is attached to the complaint, marked Exhibit "C". In this agreement Taylor undertook to secure by borrowing for said companies, on or before June 16, 1919, a sum sufficient to liquidate the indebtedness of the Tungsten Company, the Products Company, and the share of the indebtedness of the Development Company which the second parties owed. The indebtedness was estimated to be $220,000. The

parties of the second part covenanted and agreed to deliver to Taylor in full payment for his services 62 per cent of the issued capital stock of the Tungsten Company, 62 per cent of the issued capital stock of the Products Company, and 62 per cent of one-half of the issued capital stock of the Development Company, if on or before said date he secured a sum sufficient to liquidate the indebtedness as provided. It was further agreed that a deposit of the amount necessary to liquidate the indebtedness in the Wells Fargo Nevada National Bank "should be sufficient evidence of the performance of the conditions herein, for the transfer and delivery of the stock as herein provided." It was also provided that the sum so raised should be a loan to the three companies, and not payment for stock, and should be evidenced by the issue of redeemable preferred stock, "with a maximum of 7 per cent cumulative interest". The stock was not to be sold for less than 95 per cent of par, net to the company. The second parties agreed to cause a new company to be organized to which the assets of the three corporations should be conveyed, or to amend the present articles of the three companies "in order to effectuate this agreement as shall be required by the first party." Certain provisions to be made in such incorporation or amendment were specified. It was also provided that the contract should expire June 16, 1919, and carry with it the option of January 16th, and that time should be of the essence of the agreement.

In May, Bancroft again examined the mines. On the 22d instant, while the examination was in progress, he received a letter dated May 20th, from Taylor, stating that his attorney Jackson was planning to leave New York May 23d for Lovelock.

"I do not," so the letter reads, "wish to go to this expense if your examination does not check up our idea that there is at least 40,000 tons of ore assured, with probabilities of a big additional tonnage, so that, if upon receipt of this letter you can give me any idea as to whether you think the tonnage is there or not, I wish you would wire me either 'advise postponing lawyer's trip,' or 'advise having lawyer leave at once.'—If it is in any way possible I want to get the deal closed before the first of June." (Exhibit "K".) [Record, p. 910.]

May 22d Bancroft wired Taylor:

"Your letter 20th just received. Required tonnage exposed on at least two sides. Can give no positive assurance regarding tungsten contents until receipt of assay returned. Believe property will hold up and my former favorable opinion remains unchanged." (Exhibit 1.) [Misprint for Exhibit "I"; Record, p. 908.]

On the next day, May 23d, Taylor wired the Tungsten Company at Lovelock:

"Bancroft's estimate satisfactory. Have auditors wire us approximate indebtedness. Our lawyer Jackson due Lovelock Wednesday night or San Francisco Thursday night. Would Murrish prefer

have him stop Lovelock on way out, or meet him San Francisco." (Exhibit 23.) [Record, p. 829.]

The Tungsten Company replied, asking that Jackson stop at Lovelock, and stating the accounts payable were $5000 in excess of estimates; that overcharge on freight and adjustments would probably reduce that amount $4000, and that the excess could be satisfactorily explained. (Exhibits "S" and "T".) [Record, pp. 921, 922.]

May 26th Taylor wired Poole, who was then in Washington:

"Nenzel now reports indebtedness five thousand more than estimated. Believe your presence Nevada imperative if any deal to be closed." (Exhibit 2.) [Misprint for Exhibit "Q"; Record, p. 919.]

And on the 28th he wrote Poole that the statement of indebtedness given him April 30th was not an estimate, but the exact statement of accounts on that date; that neither he nor Thane could go to their people and ask them to advance the additional $5000; that he could not himself take care of this additional loan, because he would have to dig to the bottom of his pockets to raise the necessary $150,000 which would be available in cash June 2d, and suggested a method by which the stockholders of the mine could take care of this $5000 themselves. (Exhibit "E".) [Misprint for Exhibit "P"; Record, pp. 916, 917.] Thane expected to advance $25,000 of the $150,000, but on the 29th he wired Poole from New York to arrange with his associates for an

extension of thirty days on this $25,000. (Exhibit 25.) [Record, p. 831.]

On the 30th, while Taylor was enroute from Denver to Lovelock, he wired Thane as follows:

"Bancroft original tonnage estimate all right but large part not commercial thus accounting for only 20,000 tons average recoverable tungsten 1.46 per cent tungstic acid showing sure profit of only hundred thousand dollars. *Will endeavor* extend present option six months *having friendly bankrupt proceedings and myself appointed receiver make Poole superintendent* build assay office get assayer at mine and make agreement with court that we will exercise option whenever Bancroft will certify to 40,000 tons of 1.4 recoverable developed ore on at least two sides. *Bancroft still believes general prospects for big cheap mine excellent.* On this basis will you agree to take twenty-five thousand on same basis when requisite tonnage and grade developed? If you approve suggest wiring Poole urging him to favor this plan address Lovelock Saturday." (Exhibit "L".) [Record, pp. 911-912.]

The telegram indicates Taylor contemplated a better bargain, not a relinquishment of any of his right to purchase the property.

During the first week in June, Taylor with his attorneys Jackson and Bayless, was in conference with the defendants Poole, Murrish, Nenzel and Jones, in San Francisco. Jackson testified that he and Taylor wanted to go to San Francisco, because

they felt it would be possible, with the co-operation of creditors, to make a deal on substantially the lines of the April 2d contract, with advances prorated to the condition of the mine as disclosed by Bancroft; it seemed to them that San Francisco was a better place to negotiate.

Poole testified that Taylor told him not to tell his associates in the Tungsten Company that Bancroft's report was unfavorable.

"He said, 'I want to go on down to San Francisco and arrange a new deal, and if they know that I am not going through with this deal they probably won't go. I think I can deal with them better in San Francisco than I can here.' He says, 'You owe good money, don't you'? I said 'Yes, we owe money.' 'Well,' he says, 'I want to see Goodin, and have him come to San Francisco, and if these fellows get obstreperous he can put the screws to them.'" (Trans., p. 397.) [Record, p. 525.]

Loring testified that about June 25th, or some time after the middle of June, he had breakfast with Taylor at the Belmont Hotel in New York. During the conversation Taylor stated that the mine had not developed in accordance with his anticipations; that it "had developed 19,800 tons of ore, but by a stretch of imagination he could bring it up to 23,000 odd tons. I don't remember the exact tonnage that he had set out to develop—a larger tonnage. 'Well', I said, 'then you don't propose to go on with the deal?' He said 'I do.' He said, 'I am going to take

the mine away from the boys, or away from Friedman,' or something to that effect, and looked me right in the eye when he said it." (Trans., p. 543.) [Record, p. 714.]

Jackson testified that at the San Francisco conference he stated to Murrish and his associates that Taylor's reason for entering into the contract of April 2d was Poole's statement in Denver that the mine contained 60,000 tons of commercial ore, and it now developed that the representation was a mistake, as Bancroft who had just examined the mine, reported there were but 20,000 tons.

Taylor's proposal for a new agreement, embodied in a writing presented to the defendants at San Francisco (Exhibit 17) [Record, pp. 813-822], provided for the organization of a new corporation, to which should be conveyed the assets of the Tungsten Company, the Products Company, and one-half of the issued stock of the Development Company. *The officers of the new company were to be Taylor president,* Thane managing director, *Poole mine superintendent,* directors, Taylor, Brown, Friedman, Poole and a representative of the creditors. Taylor on his part was to purchase $85,000 of the company's bonds, paying 95 per cent of their face value, the bonds to draw 7 per cent interest, and to be a first lien on all the ore blocked out in the mine. The money derived from the bonds thus sold to Taylor was to be applied, $10,000 for working capital, the remainder in payment of creditors' claims under $500; and a dividend of about 45 cents on the dollar

to other creditors. The creditors were to agree to defer enforcement of their claims until Taylor should have reduced the mortgaged ore to concentrates; the concentrates were to be sold by Taylor, and the proceeds applied, first, to the expenses, and second, to the redemption of the bonds. It was further provided that when an engineer selected by Taylor certified that 20,000 tons of additional ore were blocked out, Taylor was to purchase additional bonds at 95 per cent of the face value, bearing 7 per cent interest, secured and paid as the first bonds, sufficient in amount to liquidate the debts, but no more than enough to net the company $65,000 for that purpose. Sixty-two per cent of the stock in the new company was to be issued to Taylor for his services. Each and all of the creditors were to jointly and severally agree not to take or commence any proceedings against the new company which would in any manner embarrass Taylor in the collection of his advances. And finally, the agreement was not to become effective, unless creditors owning 95 per cent in amount of the scheduled claims in excess of $500, became parties thereto. (Exhibit "A-1".) [Record, pp. 935, 936.]

This proposed agreement was rejected by the creditors as well as by the stockholders.

July 1st [21st], defendant Loring sought an option on the property, which, as finally arranged, contemplated the payment by Loring of $333,333.33 in nine payments, the first $50,000 to be made September 1, 1919, the last, of $25,000, February 4,

1921. Out of these payments the debts, then estimated to be $200,000 were to be paid. August 10th Taylor wired Loring asking what interest the latter had bought in the Tungsten property, stating that the companies and the stockholders owed him considerable money, and that his attorneys considered he had a good case for compelling present stockholders to assign him control of the stock of both companies, or as an alternative, heavy damages. (Exhibit 28.) [Record, p. 834.] On the next day Loring replied that he held an option on the Nevada Humboldt interest. (Exhibit 29.) [Record, p. 835.] August 16th Taylor commenced two actions in this court; the first against the Tungsten Company and the Products Company, number 2262, to recover the sum of $9,179.44, as the balance due on account for money loaned. This action was settled by the payment to Taylor of $7,334.04, in December, 1919, and February, 1920. *The evidence shows that Taylor's attorneys received the payments in the knowledge or belief, as was the fact, that this money came from payments made by Loring on the purchase price of defendants' properties.* (Trans., p. 563.) [Record, pp. 668-672; 740.]

The second action, number 2263, was brought August 16, 1919, against Poole, Nenzel, Murrish, Friedman, Jones, Hinch, Goodin, Twigg, Huntington and Lena Friedman, to recover the sum of $114,579.44 damages. The complaint was sworn to by Taylor August 9, 1919, one day before he wired Loring asking what if any Nevada Humboldt inter-

ests the latter had bought. In it was set forth the same matters which are set forth in paragraphs 4, 5, 6 and 7 of the complaint in the present case, the substance of which is that the defendants last named had agreed to convey to him 62 per cent of the issued capital stock of the Tungsten Company, a similar portion of the stock of the Products Company, and 62 per cent of one-half of the issued capital stock of the Development Company, in consideration of his raising by borrowing for said companies sufficient money to pay their debts; that in order to induce him to enter into the contract of April 2, 1919, they had falsely and fraudulently represented to him that there was in said mines on that date, blocked out and ready for mining, "over 60,000 tons of scheelite ore, which would carry from 1.50% of tungstic acid to 1.75% tungstic acid"; that plaintiff, believing and relying on such representations, entered into the contract, and incurred expenses in the sum of $8,820.21; that he had given his sole time and attention to raising said moneys until about June 1st, when he learned that the representations were false, whereupon his associates, who had agreed to furnish a large portion of the money called for by the contract, declined to do so. He also alleged that if defendants' representations had been true, the ores would have had a net value of more than $320,000, and the net value of the mines above the indebtedness of the companies, would have been $170,000; that the corporations were then, and each of them was, wholly

insolvent; that the total value of the assets did not exceed $120,000; that the ore in sight April 2d was not of any greater value than $70,000; that the fair value of plaintiff's 62 per cent of the stock, if the representations had been true, would have been $105,400; and that by reason of such false representations he had been damaged in the sum of $114,579.44.

On the same day that the action for damages was commenced a written agreement was executed in which the Tungsten Company and the Products Company covenanted to sell their properties to Loring, and he agreed to pay a third of a million dollars therefor. (Exhibit "A-12".) [Record, pp. 991-1014.] This contract was ratified and approved by the owners of more than 95 per cent of the issued capital stock of the Tungsten Company, and by the owners of all the issued capital stock of the Products Company.

At the meeting of the stockholders of the Tungsten Company, held August 23, 1919, Taylor's protest was received, read and filed. The only expressed grounds of his objection were that the meeting was called without authority of law; that the proposed action was beyond the authority of the directors or of the stockholders; that no proper, sufficient or adequate notice had been given of the meeting, and that in ratifying or confirming the action of the directors of said corporations in entering into any agreement of purchase and sale of all its property, they would be exercising powers not

granted to the directors of the corporation, or to its stockholders.

September 26th, after Loring had made his first payment of $50,000, Taylor served notice on the Tungsten Company and its board of directors, and also on Friedman and his associates, demanding that the stockholders meet immediately, and set aside the action whereby they had authorized contracts with and conveyances to Loring; that appropriate actions or suits be commenced to declare the conveyances null and void, because the stockholders' meeting of August 23d was held without proper notice, and because neither the corporation, its board of directors or its stockholders had authority to execute conveyances disposing of all the corporate property.

October 16, 1919, Taylor brought a suit in this court against Loring and the Tungsten Company, asking that all conveyances, deeds, assignments and bills of sale executed by the company to Loring, the contract of August 16, 1919, between Loring and the Company, and the ratification of the same by the stockholders, be set aside. Prior to this suit, designated as B-1, Loring had paid in performance of his contract with the Tungsten Company and the Products Company the sum of $100,000.

April 17, 1920, Taylor commenced the present suit. In his complaint he alleges that after he had notified Friedman and associates that he probably would not be able to exercise his option under the contract of January 16, 1919, the defendants Poole,

Murrish, Nenzel and Friedman, (1) by means of telegrams and letters informed plaintiff that further and new development work in said mines had placed in sight large quantities of scheelite ore of commercial value; (2) that about April 2d, 1919, the defendants Poole, Murrish and Nenzel, at Denver, Colorado, represented to him that since the examination of the mining claims by Bancroft, additional ore bodies of equal grade and quality had been developed, and that there was then blocked out over 60,000 tons of scheelite ore, which would carry an average of 1.75 per cent tungstic acid; that each and all of said representations were false and untrue, and were known by the defendants to be untrue, and were made for the purpose of deceiving plaintiff and causing him to undertake and carry out the terms of the contract of April 2d; that in reliance on said representations he entered into the contract, gave his time and efforts, and expended more than $8,000 in carrying out his obligations thereunder, until about June 1st, when he discovered the representations were false; then his associates, who had agreed to furnish a large part of the money, refused to advance any more. In addition, plaintiff alleges full performance on his part; refusal of the defendants to organize a new company, or amend the articles of incorporation of the Tungsten Company, or deliver the 62 per cent of their stock; that the stock at and before the commencement of the suit had no market value; that there is no method of ascertaining the amount of damages plaintiff has

or will suffer; that defendants had contracted to sell the property to Loring; that meetings of the stockholders to ratify and confirm the contract were without adequate notice; that plaintiff promptly demanded a rescission of the sale, but the officers, directors and stockholders refused to set aside the pretended conveyances to Loring or to commence any action; that Loring took said contracts and deeds with full notice of the plaintiff's rights, and was regularly informed thereof before he had in any wise performed any part of the contract; that another meeting of the stockholders of the Tungsten Company had been called for April 19, 1920, to further authorize and ratify the sale to Loring, and unless restrained by order of this court, the 62 per cent of the capital stock, which is the rightful property of plaintiff, would be voted in favor of authorizing such sale, to the great and irreparable injury of plaintiff; that about June 1, 1919, plaintiff offered to perform each and every covenant on his part to be performed, provided defendants would allow him an abatement of certain terms therefor for and on account of said false and fraudulent representations; and that plaintiff has no plain, speedy and adequate remedy at law;

"Wherefore, plaintiff prays judgment and decree of this Honorable Court, decreeing that the defendants Poole, Nenzel, Murrish, L. A. Friedman, Jones, Hinch, Goodin, Twigg, Huntington and Lena J. Friedman be compelled to specifically perform their said contracts and deliver to the plaintiff 62 per cent

of the stock of the Nevada Humboldt Tungsten Mines Company, 62 per cent of the stock of the Tungsten Products Company and 62 per cent of the stock of the Mill City Development Company; that plaintiff have an abatement of the provision of said contract, or of the whole thereof for and on account of the false and fraudulent representations of the defendants, as shall be determined by the Court to be just and equitable";
that defendants last named be enjoined from voting said 62 per cent of said capital stock at any stockholders' meeting, in favor of any disposition of said property to Loring, or to any one else, until further order of this Court.

This suit was not commenced until after the Tungsten Company and the Products Company had received from Loring on the purchase price of their property $250,000, and Taylor had received out of that sum $7,334.04 in settlement of his action number 2262, and not until after the debts of the companies had been paid.

Taylor's whole case rests on the truth of his allegations that false and fraudulent statements were made to him, and that he relied on them to his prejudice. The burden is on him to prove these allegations by a fair preponderance of the evidence. This in my judgment he has failed to do.

The first charge of misrepresentation is as follows: Poole, Murrish, Nenzel, and Friedman, for

the purpose of inducing plaintiff to undertake the contract of April 2d,

"Falsely and fraudulently and by means of telegrams and letters informed plaintiff that further and new development work had been carried on within said mines, mining claims and mining rights of the Nevada Humboldt Tungsten Mines Company, which had developed and placed in sight, blocked out and made ready for mining, large quantities of scheelite ore of commercial value, and capable of being concentrated, and the concentrates so returned being of great value."

About the middle of February, Taylor had Bancroft's report, showing in the mines 8111 tons of ore, commercial with tungsten selling at $6.00 per unit; that the average price for ten years before the war had been $6.93; that "the average tenor of the ore was 1.75% tungsten trioxide"; and that at a market price of $6.25 per unit, treating 100 tons per day with an 80 per cent recovery, the ore would pay expenses if it carried 1% tungsten trioxide. February 14th Nenzel wrote Taylor that conditions at the mine were exceptionally bright:

"On the number two south working we have opened up an ore body which is over 15 feet wide and a good grade of ore. On the number one south * * * yesterday we relocated the ore which is of a good grade." (Exhibit 2.) [Record, p. 782.]

Ten days later, February 24th, Nenzel wired Taylor as follows:

"The number one drift south is 85 feet beyond granite dyke. (1) Ore low grade. Drift number one 60 feet beyond Bancroft sampling. Number two south tunnel 60 feet beyond Bancroft sampling. (2) Value of ore 1½ per cent. Number 2 north 275 feet from shaft, average width of vein 9 feet; (3) ore milling 1%. Number 2 south 100 feet beyond Bancroft sampling. Average width of vein 4½ feet. (4) Value of ore one-half of one per cent. Number 3 north drift 60 feet from shaft. Vein 10 feet wide. (5) Value of ore 1½ per cent. Number 3 south 55 feet from shaft. Five feet wide. (6) 1% ore. (7) Main working shaft has been advanced 24 feet all in good ore." (Exhibit 3.) [Record, pp. 783, 784.] (The numbering in the last telegram is mine.)

Tested by Bancroft's assays (Exhibit 19) [Record, pp. 824-826, and Plate No. 5-A] item 1 is correct. Item 2: Bancroft's assay taken 60 feet beyond his first sampling in number 2 south was 2% instead of 1.50%. The average of Bancroft's seven assays in that drift was .63%. Item 3: Bancroft's assay taken 275 feet north from the shaft in number two was 1.60% instead of 1%. Item 4 seems to be inaccurately designated. Item 5: Bancroft's nearest assays 60 feet north on number three, were 1.20% and 1.35% instead of 1.50%. Five assays taken by Bancroft within 60 feet from shaft averaged 1.89%. Item 6: Bancroft's nearest assays, 55 feet south from the shaft on number three, were .35% and .75% instead of 1%. Six assays taken by

Bancroft within that 55 feet averaged 1.12%. Item 7 is correct.

How and to what extent Taylor was misled by these telegrams is shown in his letter written February 24th to Nenzel in which he says:

"In view of the present tungsten situation, I do not believe there is the remotest chance of interesting anybody in the purchase of a property at half a million dollar price. The best thing to do all around would be to close down."

This is followed by an inquiry as to whether defendants would consider selling their stock to him at a reduced price. (Exhibit 1.) [Record, p. 779.]

March 7th Taylor wrote the company that the results of the development work in the mine were most gratifying, and if

"they continue as well, I think there is a chance that by the beginning of April I may be able to persuade some New York people to advance the necessary money, and clean up all the companies' indebtedness in return for some modified form of an option."

March 10th Nenzel wrote Taylor that the main shaft had been sunk to a depth of 60 feet

"since our telegram to you giving the new development work, and we are glad to inform you that we have encountered some very rich ore. The ore contains so much scheelite that we are unable to handle more than 40 tons per 24 hours in the mill when working on ore taken from the shaft. How long

this will continue we do not know, but it certainly looks very encouraging."

This was literally true. At the time the letter was being written they were sinking through ore assaying, according to Bancroft, 3.55 per cent and 2.45 per cent tungstic acid, and they had just passed through some assaying as high as 5.00 per cent. (Exhibit 19.) [Record, pp. 824-826 and Plate No. 5-A.]

On the following day, March 11th, Taylor wrote the Tungsten Company, refusing to advance $15,000 on a carload of ore to be shipped. He did not believe that a bona fide bid of more than $6.00 per unit for tungsten could be gotten out of any domestic customer.

"It is possible," he says, "if I could talk the general situation over with some of you we could arrive at some solution of the entire matter. Possibly Mr. Murrish or some of the rest of you could come to Denver, and if they come over with the idea of some financial rearrangement, it would be well for them to have a balance sheet with books, and a full statement showing the amount and present status of all the indebtedness."

March 12th Nenzel wired that the mine never looked so good. On the 21st Friedman wrote Taylor: "The mine is looking better than ever." March 25th Friedman wired Taylor, suggesting that he and Bancroft come to Lovelock for a conference as to modifying the option, and said:

"I am sure you will find mine development fulfilling your most sanguine expectations. I am confident that we could arrive at some modified arrangement as suggested in your correspondence."

On the same day, March 25th, Taylor wrote Friedman that neither he nor Bancroft could go to Lovelock, and suggested that Friedman or Poole come, or that Poole, Murrish and Nenzel be appointed a committee by the stockholders to readjust the option. "Regarding the exercise of the option, it certainly looks pretty blue at present." For a readjustment he suggested some arrangement whereby cash could be furnished to liquidate all the company's indebtedness, and he acquire 75 per cent, or all of the stock of the company, and pay for it out of future earnings.

March 27th Nenzel wrote Taylor that no accurate survey of mining development had been made since Bancroft's examination of the mines in January. He also said they had drifted both north and south from the shaft on the fourth level, "all in exceptionally high grade ore." Bancroft later took two assays, one on the face of each drift, and about 15 feet from the shaft. The returns were 1.40 per cent and 1.45 per cent.

A comparison of Bancroft's two reports (Exhibits 15 and 19) [Record, pp. 803, 1473-1488 and plates, 824-826 and Plate No. 5-A] shows that there was twice as much commercial ore blocked out in May as in the latter part of January. *It also shows*

that the main shaft between the third and fourth levels was sunk in very rich ore. The 24 feet all in good ore mentioned by Nenzel, and the 60 feet by Friedman, were between these two levels. Bancroft reports eight assays or ore in that space as follows: 1.4, 0.75, 1.85, 5.00, 3.25, 1.85, 3.55 and 2.45 or an average of 2.51 per cent.

In view of this correspondence and Bancroft's second report, it is impossible to find that the letters and telegrams in evidence from defendants to Taylor prior to April 2, 1919, contained fraudulent misstatements, or that by anything in such letters and telegrams Taylor was misled.

The second charge of misrepresentation is that Poole, Murrish and Nenzel, at Denver, falsely and fraudulently represented to Taylor that since the examination of the mining claim by Bancroft in January, additional ore bodies had been developed, and that there was then blocked out, in sight and ready for mining over 60,000 tons of scheelite ore which would carry an average of 1.75 per cent tungstic acid; that such representations were false, made for the purpose of inducing him to undertake and carry out the terms of the agreement of April 2d, and were relied on by him to his prejudice.

Taylor swears that Poole made the statement, but Poole denies it, and in his denial is supported by Murrish and Nenzel. They go even further, and say that prior to the time when they had agreed on the terms to be incorporated in the new agreement no statement had been made as to the tonnage in

the mine. This seems unreasonable when we reflect that the selling price of a mining property depends so much on the quantity of commercial ore in sight; but *nowhere in the correspondence between Taylor and defendants subsequent to April 2d and prior to June 1st is there any mention of 60,000 tons of ore in the mine.* It is not mentioned in Taylor's telegram of April 3rd to Bancroft, outlining the terms of the new agreement, or in the prospectus prepared by Taylor and Thane early in May, in which it is stated that on April 1st a new survey indicated ore reserve of 41,000 tons. (Exhibit "U".) [Record, p. 926.] In a letter dated April 17th, addressed to Roy C. McKenna, Vanadium-Alloys Steel Company (Exhibit 33) [Record, pp. 842, 843], and in another of the same date addressed to the Crucible Steel Company (Exhibit 32) [Record, p. 839], Taylor said:

"So far the shaft has been sunk 180 feet below the depth at the time of Bancroft's examination, and one of the upper levels extended. * * * The result is now assured minimum of 43,000 tons of ore."

May 14th Taylor wired Bancroft: "Want your statement that 40,000 tons sure with 1.4 per cent recoverable." (Exhibit "G") [Record, p. 906.] In a letter of the same day (Exhibit "N") [Record, p. 914], Thane urges Bancroft to have his report complete and available in San Francisco before May 31st:

"First on the tonnage in sight * * *. This must be known in order that we may be certain there is sufficient tonnage to absolutely guarantee the $150,000 necessary to close this transaction. * * * If we are able to close it, it will be a good piece of business for all of us."

If, as Taylor states in his telegram to Thane, dated May 30th (Exhibit "L") [Record, p. 911], 20,000 tons having an average recovery of 1.46 per cent tungstic acid shows a sure profit of $100,000, we may safely conclude that 40,000 tons would yield a sure profit of $200,000. If there were 40,000 tons of ore in the mine capable of yielding a profit of $200,000, it would seem to be a profitable venture on Taylor's part to loan the company $150,000 at 7 per cent interest, if his loan were secured as provided in the contract of April 2d, and he received 62 per cent of the capital stock of the company for his services in making the loan. When he entered into the contract of April 2d he had before him Bancroft's table (Exhibit 15, p. 1.) [Record, p. 1473 et seq.], showing with a simple calculation that the net value of 8111 tons at $9.00 per unit would be over $61,000; the net value of 20,000 tons would be about $150,000; of 40,000 tons about $300,000; and of 60,000 tons about $450,000. The price specified in the option of May 16th, paragraph 2, was $10 per unit, *and within one week after the contract of April 2d was executed, the Tungsten Company was offered $9.00 per unit for 100 tons.* (Exhibits 7, 35 and 44.) [Record, pp.

790-792; 845-847; 859-860.] Of course it is possible that Taylor would not have entered into the agreement of April 2d if he had not believed there were in sight in the mine 60,000 tons of commercial ore; *but the testimony, as well as the probabilities, fail to prove it.* His first option, January 16th, fixed a price of $498,400, or fifty cents per share, for Tungsten Company stock. February 24th he suggested the option be so modified that he might advance, as a secured loan with 7 per cent interest, enough money to pay the company's debts and purchase stock at 28 cents per share, to be paid for out of the profits of the mine after the debts were paid. Of this proposition he wrote in the same letter it "means that you would be giving me a one-half interest in the mine for liquidating our present indebtedness." *This proposition was made nine days after the date of Bancroft's first report showing 8111 tons of ore in the mine.* March 7th he thought there might be a chance to raise money to clear up the indebtedness in return for a modified option. March 11th he wrote the tungsten situation was so bad the market value of tungsten would probably not be placed at over $6.00; yet within a month thereafter the company seems to have been offered $9.00. March 25th he wrote that as to exercising the option it looked pretty blue. He suggested raising enough money to pay the debts and the acquisition by him of 75 per cent of the stock, to be paid for out of the future earnings of the mine. (Exhibit 12.) [Record, pp.

797-800.] Eight days later the agreement which is alleged to have been induced by fraudulent representations, was entered into, in which he undertook to secure by borrowing enough money to pay the debts, and for such services he was to be given 62 per cent of the capital stock. *May 23d, after he learned from Bancroft that the required tonnage of 40,000 tons was exposed, but that no positive assurance could be given regarding the tungsten contents until receipt of assay returns, he wired the Tungsten Company that Bancroft's estimate, 40,000 tons, was satisfactory.* (Exhibit 23.) [Record, p. 829.] *The question naturally arises, why did Taylor say that 40,000 tons were satisfactory, if he had been led to believe, and did believe, and would not have entered into the contract if he had not believed that there were actually, 60,000 tons of commercial ore in sight in the mine? It was not until attorney Jackson came to Lovelock, about May 29th, that any mention was made, or any use was attempted to be made, of the alleged fraudulent misrepresentations. There is no hint of it even in his telegram to Thane from Ogden, dated May 30th.* (Exhibit "L", supra.) *Taylor's whole conduct indicates that he was satisfied in January as to the value of the property; that he determined then to secure it. From that time on his single purpose seems to have been to obtain it as cheaply as possible, and with the smallest possible outlay of money on his part.* HE TESTIFIED HIMSELF (Trans. p. 85) [Record, p. 118], REFERRING TO THE FIRST DAY OF THE CONFERENCE AT

DENVER, BEFORE ANY STATEMENTS AS TO TONNAGE ARE CLAIMED TO HAVE BEEN MADE: "I WAS WILLING IN A GENERAL WAY AT THAT TIME TO MAKE A CONTRACT ACCORDING TO THE TERMS THAT WERE FINALLY ARRANGED." *And again he testified in relation to Poole's alleged false representations, that he supposed he was merely getting Poole's opinion based on such developments as then existed as to how many tons would probably be there* (Trans. p. 109.) [Record, p. 148.] First he secured an option under which he could acquire the property by paying 50 cents per share for stock, or a total of $498,400. In February he began to urge a modified option, because, as he said, no sale of the property at that price was possible; the tungsten market was bad; the best thing to do all around was to close down the mine. April 2d, a new, and for him a better contract was executed, under which he was to receive 62 per cent of the stock if before June 16th he obtained as a loan to the company enough money to pay its debts, estimated at $220,000. Early in May it was understood that it would be necessary to raise a loan of about $150,000 to pay the debts. Later he was informed there had been a mistake, the debts had been under-estimated about $5,000. He at once wired (to Poole) that he believed Poole's presence in Nevada was imperative if any deal was to be closed. He also wrote Poole two days later, on the 28th day of May, stating that he personally could not take this additional loan of $5,000, because he had to dig to the bottom of his pockets to raise

the $150,000. He asked Poole to talk the matter over with Jackson at Lovelock. On the next day Thane wired Poole to procure for him (Thane) an extension of thirty days to raise his $25,000. *At Lovelock Poole was informed that Bancroft's report was unfavorable, and was cautioned, according to Poole's testimony, not to inform his associates, because if they knew Taylor did not intend to go through with the deal they would not go to San Francisco; he wanted to arrange a new deal, and he thought, as Jackson also testified, he could deal with them better in San Francisco than in Lovelock. About this time, May 30th, in a telegram to Thane, he outlined a plan to have the option of April 2d extended for six months, friendly bankruptcy proceedings, himself appointed receiver, Poole appointed superintendent, agreement with the Court to exercise option whenever Bancroft would certify to 40,000 tons of ore 1.4 per cent recoverable developed. He asked Thane if he approved to wire Poole (the very person who had, as he claims, fraudulently misled him into the agreement of August [April] 2d), urging him to favor this plan. To the telegram is added the illuminating statement: "Bancroft still believes general prospects for a big cheap mine excellent."* [Record, pp. 911-912.] *This plan, could it have been arranged, would have enabled him to operate the mine for six months without advancing or borrowing any money for the creditors.* In San Francisco, June 2d, his proposition, in substance, was to advance

$85,000, instead of $150,000, as a secured loan, of which $75,000 would be distributed to creditors, and $10,000 used for working capital. Taylor was to be president, Thane managing director, *and Poole superintendent of the new company to take over and operate the mine.* When an engineer, to be selected by Taylor, certified that 20,000 tons of additional ore were blocked out, Taylor was to advance not to exceed $65,000 more for the creditors, and for his services he was to receive 62 per cent of the stock. His advances were to be a first lien; all the creditors were to agree jointly and severally, not to embarrass him in the collection of his advances. A meeting of the creditors was called, at which they were informed Poole and his associates would abide by their judgment. The creditors promptly rejected Taylor's proposition.

In my judgment Taylor was neither misled nor deceived by the defendants. He was following consistently an original plan to secure the property for the smallest possible outlay of money on his part. His forecast as to what the creditors would do was at fault; he failed to anticipate the competition of Loring, and made an offer at San Francisco which he must have known would not be accepted if the owners had any alternative.

I find the evidence is not sufficient to show that the alleged false representations as to tonnage in the mine were made; and even if there were such representations, Taylor was not thereby induced to

enter into the contract of April 2d, or to attempt to perform its conditions. That contract, as well as the option of May 16th, expired by limitation June 16, 1919; prior to that date no deposit in the Wells Fargo National Bank of San Francisco of an amount sufficient to liquidate the indebtedness of the defendant corporations was made by or for Taylor. He never performed what he agreed in the contract to do; he never made an unconditional offer of performance, and never prior to June 16th was he actually ready, able and willing to perform unconditionally.

It is unnecessary in view of the conclusions reached on the merits of the case, to determine other issues raised by the pleadings. Plaintiff is not entitled to a decree requiring any of the stock of the Tungsten Company, of the Products Company, or of the Development Company to be delivered to him, or to an order restraining or controlling in any manner the use or voting of such stock.

Let a decree be entered in favor of defendants in accordance with the foregoing opinion.

Appellant's Position on the Appeal Record.

It is the foregoing careful and well-considered opinion of the Trial Court which heard all the testimony, and observed all the witnesses, in open Court, that is attacked by appellant.

There is not a single exception to any ruling of the Court upon introduction of evidence at the trial assigned in the record.

Counsel make no attempt to reply to the point that even the attempted assignments of error Nos. I, II and VIII are too general to be noticed by the Court, under the familiar rule laid down in *Doe v. Waterloo Mining Co.,* 70 Fed. 461; *U. S. v. Ferguson,* 78 Fed. 103, 105; *Hart v. Bowen,* 86 Fed. 877, 882; *Florida Central Co. v. Cutting,* 68 Fed. 587, and *Grape Creek Coal Co. v. Farmers' Loan and Trust Co.,* 63 Fed. 891, and that the remaining assignments (Nos. III, IV, V, VI, VII and IX) are not only open to same objections as that urged above to the other three, but that they are merely attacks on the *opinion* of the Court, contrary to the rule so explicitly laid down in *McFarlane v. Golling,* 76 Fed., at p. 24, and cases cited (see Opening Brief of Appellee Loring, pp. 13-15).

Counsel admit in the opening brief (pp. 20, 35) that their brief and argument on the question of the preponderance of evidence is directed to the *opinion* of the Court.

Not only this, but admitting in their opening brief (p. 50) that there is a conflict in the testimony nevertheless, in the face of the well-established rule of this Court regarding the conclusions of a Chancellor on conflicting evidence *where the Chancellor has had an opportunity to see and observe the witnesses,* they ask this Court to pass upon the

creditibility of these same witnesses and to reverse the Trial Court upon the facts.

Counsel in their closing brief (p. 9) cite the case of *American Rotary Valve Co. v. Moorehead,* 226 Fed. 202, in support of their effort. That decision was upon a rehearing, and was delivered simply to cover the academic proposition that, under the liberal rule of the seventh circuit, a review may be had for an obvious mistake, which is not involved here, and even in that case the Court is careful to state that, as it believed nothing was involved in the appeal except questions of fact, it had affirmed the decree of the District Court without filing an opinion, and then proceeded to make the same disposition of the case on the rehearing, and not only in that case but in *Espenschied v. Baum* (cited in it), the Court goes on to point out the controlling opportunity of the trial judge to estimate the credibility of the witnesses and their appearance and demeanor on the stand, and, in each of these cases, the Court refused to reverse.

In view of counsel's ignoring the rule, and on account of the persistence in their manner of argument, we respectfully ask permission, in addition to the cases cited on this point in our opening brief (pp. 21-22), to cite to the Court two cases in the *ninth circuit,* in which the rule in this circuit has been stated:

> "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends they are contrary to the

> weight of evidence. The trial Court made findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by credible testimony of reputable witnesses. Upon settled principles which this Court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed. 609, 616, per Gilbert, Circuit Judge (affirmed in 249 U. S. 12, 30).

> "The case having been tried without the intervention of a jury, the Court's findings are conclusive of the questions of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the Court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made."

Cook v. Robinson, 194 Fed. 753, 759 (before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge).

Appellant's Reply Brief Incorrectly States Record as to Loring's Position.

Perhaps one of the reasons of the rule just stated as to conflict of evidence may be found, too, in the undesirability of having counsel, particularly where the record is long or involved, attempt to discuss

the facts before a Court that has not heard the evidence, and, therefore, is not aided by its memory to check up or correct a misstatement of them.

Counsel state that the record discloses that in June, 1919, at the Belmont Hotel in New York Taylor told Loring that he intended to commence action to get the stock he claimed was due him under the contract from Friedman and the other defendants.

The record cited by counsel does not bear out this statement at all. Taylor testified that he telegraphed Mr. Loring asking him to meet him for a general discussion of the tungsten situation, *understanding there was a combination of the country's tungsten producers, and he (Taylor) wanted to secure a sales agency of that product;* that he understood Mr. Loring was the man to talk to; that he had told him his people had not made an agreement with the Friedman people. His testimony as to this portion of the conversation is most vague; that he does not know how much detail he went into; that "his people" had "a claim" against them, and hints that the probabilities were he would file some sort of a suit, just what he didn't know. *Not a word about commencing action to get stock alleged to be due him under any contract, or that he told him he had any such contract.* (Record, pp. 353, 354.)

Counsel then go on gaily to say that the record shows that Loring admits Taylor at that time gave

him notice of an intention to commence an action and to get the stock due him under the contract from Friedman and the other defendants (Appellant's Reply Brief, p. 2). Counsel make this statement right in the teeth of record being exactly the opposite (cross-examination of Loring):

> "Q. Did you at that time discuss with Mr. Taylor the Nevada Humboldt Tungsten Mines Company property?
>
> A. Casually, yes.
>
> Q. Did he not at that time inform you he was about to bring an action against the Nevada Humboldt and the defendants Friedman, Poole, Murrish and others here defendants, and did you not at that time say that you would keep your hands off the Nevada Humboldt?
>
> A. *I did not.*
>
> Q. You didn't have that conversation in substance and effect?
>
> A. *Not anything pertaining to it.*" (Record, p. 713.)

At that time Loring had never seen, or known the terms of Taylor's contract of April 2, 1919, upon which this suit has been brought, and never knew the terms of that contract before entering into his own contract of August 16, 1919. (Record, p. 715.) Loring was an operator producing a large amount of concentrates from the Pacific Tungsten properties in the immediate vicinity of the Friedman properties. (Record, p. 714, bot., and 715, top.) Taylor wanted to secure a sales agency of tungsten product, and what he discussed with Loring at the Hotel Belmont was money matters

pertaining to the sales on the market of tungsten. Knowing that Taylor was handling the product of the Nevada Humboldt mine under some sales contract and option on property (January), the property was only casually mentioned in connection with the discussion of the market sales of tungsten, and therefore when Taylor told him he was "going to take the mine away from the boys" or "away from Friedman," or something to that effect (Record, p. 714), he did not say anything about how he was going to do it, or go into that phase of it (Record, p. 716), and Loring did not, and could not, have any idea that the threat was in any way connected with any contract for stock. It is that sinister expression of wolfishness which is now attempted to be twisted into notice of intention to commence an action for specific performance. The expression is rather a corroboration of Taylor's scheming plan to "put the screws on them" through their creditors (Record, p. 525), and through bankrupt proceedings get possession of "a big cheap mine" by having himself appointed receiver! (Record, pp. 911-912.)

Counsel's statement with reference to the character of Loring's option at the time he received Taylor's telegram of August 10, 1919, is also incorrect and misleading. The record discloses the facts to be as follows:

On July 21, 1919, Mr. Loring entered into negotiations with certain stockholders of defendant cor-

porations looking to the purchase from said corporations of certain properties belonging to them. (Record, pp. 1111-1112.) On that day defendants L. A. Friedman, Poole, Jones, Hinch, Nenzel and Lena J. Friedman, instead of arranging for an option on the mining properties from the defendant corporations to Loring, *granted Mr. Loring an option on their stock* and that of their associates in the defendant corporations. (Record, p. 1110.) In like manner, on August 9, 1919, these same defendants agreed to a modification of the option they had granted him on July 21, 1919. (Record, pp. 1113-1114.) Then came Taylor's telegram of August 10, 1919, to Loring, stating that his attorneys considered he had a good cause for compelling present stockholders to assign to him control of stock of both companies *or as alternative* heavy damages, and stating that his actions would largely depend on what if any *interests* Loring might have as he did not want to involve him. (Record, p. 834.) Loring replied on August 11, 1919, that he held option on Nevada Humboldt interests. (Record, p. 835.) The option on Nevada Humboldt interests which Loring held on that date, August 11, 1919, and to which he referred, was plainly the aforesaid options on stock granted July 21st as modified by the letter of August 9, 1919. Five days after being advised by Loring that Loring held an option on the Nevada Humboldt interests, Taylor, on August 16, 1919, brought what he himself had termed his "alternative" suit

against the defendants other than Loring for "heavy damages," viz: $114,579.44. (Record, pp. 936-956.) On that day Taylor also filed suit for collection of his "claim" against defendant corporations for $9,179.44 as balance for money loaned to corporations which was secured by concentrates. (Record, p. 1117.) On that day, August 16, 1919, Mr. Loring did not exercise any option he held on stock, but, on the contrary, signed up an agreement of bargain and sale with the defendant mining corporations for the purchase of their mining properties (Record, pp. 991 et seq.), an agreement which contemplated a ratification by the stockholders at meetings to be held on August 23, 1919 (Record, pp. 1048 et seq.), and on which no money was to be due from Loring until September 1, 1919, when the first payment of $50,000 on account of the purchase price was to be made. (Record, p. 1023.) Learning that Taylor had brought his action at law (Record, p. 706), he caused the papers in the case to be examined for assurance, and long before either of said dates learned on August 19, 1919, that Taylor's suit was for damages only, and that Taylor in said suit laid no claims to any shares of stock. (Record, pp. 706, 707, 708, 715, 1116, 1117.) It may be noted in this connection, in passing, that while counsel, on page 3 of their Reply Brief cite Mr. Loring's answer on page 708 of the Record, they fail to cite his answers on page 715 of the Record which make correction of it. (Record, p. 715.) When Loring obtained the ratification by the stock-

holders on August 23, 1919, and made the payment which he was obligated to make on September 1, 1919, he had already been informed by Taylor that whether he would sue for specific performance or for heavy damages would depend upon what interest Loring might have in the matter and that he did not wish to involve Loring, and that after being informed by Loring's wire that Loring was interested, Taylor had actually filed his suit for damages and not for delivery of stock. (Record, p. 834.)

Loring has acted in entire good faith from beginning to end. After receiving Taylor's wire of August 10th, he did not exercise any option he held on the stock. He entered, instead, into a buy-and-sell agreement for the purchase of the mining properties from the companies, and on a scale that would leave them in a position to take care of all their creditors and even any possible damages; and he had Taylor's telegraphed assurance that he did not wish to involve Loring, and he knew before he obtained his ratification or paid any money that Taylor had elected to sue for damages only.

Counsel attempt to make the point that the notice of the stockholders' meeting of August 23, 1919, gave seven days' notice, and contends that this was in violation of Section 96 of the General Corporation Law of Nevada. (Statutes of Nevada, 1913, p. 65.)

The requirement of the Tungsten Company's By-laws of notice for holding special meetings of stock-

holders was at least *five days' notice* (Record, pp. 1101-1102), and seven days' notice was actually given by the secretary, and proof of the service made at the meeting and the affidavits of mailing same ordered filed with the secretary after being exhibited to the stockholders. (Record, p. 1048.)

In the first place, counsel are silent on the point that *Taylor was not a stockholder of the Products Company at all, and that the ratification of the Loring contract of August 16, 1919, by that company was made by the holders of every share of its entire capital stock.* (Record, p. 1034.) In the next place, *it was only of the Tungsten Company that Taylor was a stockholder, and even of that company was a holder of only 5,000 shares out of a million shares, and, as far as he was concerned, he did receive notice, for "by his attorney and proxy" he objected* to the meeting and to the ratification of the Loring agreement upon the ground that notice of the meeting was insufficient and that the sale was beyond the powers of the directors. (Record, pp. 848-849, 1049.) The record shows that no other stockholder of the Tungsten Company objected to the ratification.

The Nevada Statute, cited by counsel, we insist, was not intended to apply to sales of a corporation's assets when necessary to satisfy the claims of creditors.

The general rule prevailing in the United States is that a sale of all the property of a corporation,

which is a going concern, is *ultra vires* without the unanimous consent of all the stockholders, and at the same time, the rule is well recognized that where a corporation is insolvent or it is necessary to pay its debts, then such sale may be made without unanimous consent.

3 *Cook on Corporations* (7th Ed.), Sec. 670.

We submit that it was not the intent of the Nevada statute to change the rule in the latter regard; but it was intended to modify the general rule as to going concerns, so as to permit 60 per cent. of the stockholders to wind up a corporation in their discretion, and thus modify the rule prevailing generally elsewhere that unanimous consent is necessary.

The board of directors of a corporation, without ratification by the stockholders, has the right, if necessary, to sell all of its property for the purpose of paying its debts. See,

Beardstown Pearl Button Co. v. Oswald, 130 Ill. App. 290-294;

Lange v. Reservation Mining & Smelting Co., (Wash.), 93 Pac. 208;

Sewall v. East Cape Etc. Co., 50 N. J. Eq. 717; 25 Atl. 923.

As in the case of the *Reservation Mining & Smelting Co.,* supra, the By-laws of the Tungsten Company gave its Board of Directors the broadest powers, viz.:

> "1st. * * *
>
> "2d. To lease, purchase or otherwise acquire, *sell, assign or otherwise convey,* in any lawful manner for and in the name of the company, any of its real estate or other property, rights, privileges, whatsoever, deemed necessary or convenient and on such terms and conditions as they think fit, and at their discretion to pay or accept therefor, either wholly or in part, money, stock, bonds, debentures or other securities, either of this company or any other company." (Record, p. 1106.)

This authority on the part of the board of directors also exists if the corporation is insolvent. As plaintiff made oath on the 9th day of August, 1919, that the corporation was insolvent, he certainly cannot complain if the board of directors undertook even to sell all of its property at its meeting held on the 16th day of the same month. The minutes of the Directors' meetings of both companies plainly and explicitly recite the necessity of entering into the agreement of August 16, 1919, with Loring, because the companies "have become heavily indebted to various creditors and have not sufficient funds to meet the demands of said creditors." (Record, pp. 864, 1017.) But, assuming that a board of directors cannot sell all of its corporate property even for the purpose of paying its honest debts, nevertheless the fact is here that the corporation did not sell all of its property to Mr. Loring. It reserved and excepted certain articles of value of several hundreds of dollars. (Record, pp. 869, bot., 870, top; pp. 996, bot., 997, top; pp.

1022, 1083.) Such excepted property took the case out of the statute.

Shaw v. Hollister Land Etc. Co., 166 Cal. 257;
Bradford v. Sunset Land Co., 30 Cal. App. 87, 90.

No authority or ratification by the stockholders was, therefore, essential under the provisions of the Nevada Statute, relied on by plaintiff, and the cases cited by his counsel with reference thereto are not in point.

In addition to all this, Taylor is, of course, precluded by the ordinary rules of conscience and fair dealing from asserting against Loring his claim in a court of equity. The acceptance and use of Mr. Loring's money by the corporation is in itself a ratification of the sale to him, and it is estopped to dispute the sale where it has received and used or seeks to retain the proceeds, and it is a thoroughly well recognized rule that if a corporation is estopped from suing to set aside a transaction, then a stockholder is in the same position, the estoppel of the corporation, in other words, being binding upon each of its stockholders as pointed out in Appellee Loring's Opening Brief, pages 8 and 9.

Counsel claim that it cannot be said that Taylor was guilty of laches and yet the record shows that he was guilty of gross laches.

Taylor refrained from bringing his suit until after Mr. Loring had paid in enough money to pay

off all of the creditors of the corporation (including himself), and some $33,000 additional. Taylor told Mr. Loring in his telegram of August 10th that he, Taylor, had the alternative of suing for damages or for 62 per cent. of the stock. On August 16th he sued for damages and Loring received notice thereby which of the alternatives mentioned by Taylor he had taken. Taylor claimed damages, not the stock. Loring entered into his contract with the corporation, wherein he obligated himself to pay $333,333.33 and Taylor brought no action for 62 per cent. of the stock. On the contrary, his protest at the August 23rd meeting and his demand on the other stockholders to begin suit to set aside the conveyances confirmed the recognition as stockholders. Taylor waited. He did not even begin his action B-1, to set aside the conveyances on a technicality until after two payments of $50,000 had been paid into the corporation, *and that suit involved no suggestion of any suit for 62 per cent. of the stock. Taylor waited until all conditions with regard to the corporations, their future, and the property's future had changed. He waited until he had received from the corporation out of Loring's money the settlement of his own claim of over $7,344.04. He waited until after all the money to pay the creditors had been paid in and afterwards distributed to the creditors beyond recall in the payment of the companies' debts. He even states in his complaint in this action that he waited till there might be a change of condition through*

possible Congressional action. He has stood by for nearly a year, seeing Loring loyally making the payments he was compelled to make under his contract, on penalty of forfeiture, *of which the corporations and Taylor himself were the beneficiaries, and he made no claim until this suit was filed. April 17, 1920, that he was entitled to any stock.* The corporation, which he himself alleged under oath on August 9th, 1919, was insolvent, is clear of its enormous debt, and is now in funds. If ever there was a cause of gross laches, it is the case at bar.

See *Cook on Corporations* (6 Ed.), Sec. 733, and cases cited.

Six months is enough: 143 Fed. 483, *486;*
Eight weeks: 65 Atl. 730, *731;*
Three months: 99 Cal. 355;
Four months: 78 Cal. 389;
100 days: 10 Colo. 529.

The laches consist in his delay in asserting this present claim to 62 per cent. of the corporate stock. The fact that he claimed in another suit that Mr. Loring's contract and deeds were void merely for want of proper notice of the stockholders' meeting which ratified them, is, of course, no excuse for delaying to make the claim which is involved in the present action.

Counsel attempt to palliate the fact that when in settlement of his claim for $9,179.44 against the Tungsten Company, Taylor accepted the $7,334.04 out of funds he knew that Company had been paid

under its contract with Loring, he took it as a creditor and not as a stockholder. At a time after he had sworn on August 9, 1919, to the fact of the Company's insolvency, he knew that the only funds from which the check for $1,000 thereof which he received and personally endorsed (Record, p. 976) was the money it was receiving from Loring on the contract to which he was objecting. When he accepted the $6,334.04 thereof he also knew through his counsel that it was from the same source. (Record, p. 704.) To attempt to say now that because he accepted these pecuniary benefits as a creditor and not as a stockholder he accepted no "pecuniary benefit" is to mock the conscience of the chancellor. The decisions do not make any such absurd rule. The hands of such a stockholder will not be clean enough to come into a court of equity if he "has acquired and accepted pecuniary benefits" out of funds *provided through the agreement he is seeking to attack.* (See cases cited on pages 8 and 9 of Appellee Loring's Opening Brief.)

Failure of Appellant's Reply Brief to Show Evidence Misrepresentations Correspond to Allegations of Fraud Set Forth in His Pleadings.

Counsel for appellant have not said anything in the remainder of their brief as to alleged misrepresentations, etc., that have not been completely covered by the briefs for the other appellees, and that need any extended comment here. It would appear from the record that Taylor's whole contention as to misrepresentations by the other appellees and his alleged reliance upon them was a palpable after-thought. The record of proof fails utterly to dovetail with the frame-work of the complaint drawn on charges of fraud.

A. NO PROPER BASIS LAID FOR COMPARISON OF RESULTS OBTAINED BY PANNINGS AND THOSE OBTAINED BY BANCROFT.

The palpable unfairness of any attempt to show any essential conflict between Nenzel's telegrams and Bancroft's second report is manifest in the testimony in the record. No sufficient basis appears for the comparison counsel are now seeking to criticize in the Court's Opinion. The mere estimates that were put on the map by John Huntington were gotten by him from pannings in the mine at the points indicated, made by Morrin, the mine superintendent, and Taylor was told of that fact. (Record, p. 499.) Bancroft's method, on the other hand was to take samples across the entire width of the working in the event that the width did not

exceed six feet; in the event that width did exceed six feet, which he stated was true in a few instances, he took two sections, so he stated he believed he had no sample which was more than six feet wide. (Record, p. 254.) Then Mr. Bancroft himself, made a witness for the appellees in order to avoid the objection that the questions were not cross-examination, testified that there would be *no necessary approximation* between the results obtained by the two methods:

> "Q. In order to even approximate the method that you adopt in practice of cutting a trench and taking a spoil, it would be necessary to cut a similar trench and take a similar spoil, and place in what you would call the pan, would it not?
>
> "A. To approximate the same results, yes.
>
> "Q. So unless a man who was following the panning process cut trenches six feet on an average where the vein was wide enough, or less than six feet where the vein was not wide enough, there would be no necessary approximation between your result and the results which he would obtain, would there?
>
> "A. *I can go a little stronger than that; unless he cut his samples in approximately the same samples, in the same widths which I used, his results would not approximate.*
>
> "Q. That is exactly the proposition which I wish to bring out." (Record, pp. 258-259.)

With the handicap thus pointed out, it would be impossible to expect exact approximation. Under the circumstances, nothing closer could be expected than the approximation contained in the painstaking comparison in the opinion of the trial Court, which

demonstrates that there is no substantial conflict between the facts disclosed by Nenzel's two telegrams and Bancroft's report.

B. TONNAGE DEVELOPMENT NOT AN INDUCING CAUSE. TAYLOR WOULD HAVE ENTERED INTO APRIL 2nd CONTRACT WITHOUT ANY REPRESENTATION WHATEVER AS TO TONNAGE.

The record discloses that Taylor would have entered into the same contract of April 2, 1919, without any representation whatever as to tonnage. From February 24, 1919, to April 2, 1919, Taylor was desirous of entering into an arrangement along lines finally agreed upon on April 2, 1919. This he was willing to do upon the strength of Bancroft's first report without reference to the amount of increased tonnage actually developed.

While at one time he contemplated having Poole come to Denver, bringing data as to development work and assays, so that he and Bancroft could together work up a definite tonnage statement of ore developed, this was not for the purpose of giving him information upon which to frame a new contract. Any discussion as to tonnage came after Taylor was ready to enter into the contract upon substantially the terms that were finally agreed upon. It follows that no representation as to tonnage could have been an inducing cause for Taylor's consent to the contract.

This contention is demonstrated by three exhibits and a portion of Taylor's testimony, which follow:

Exhibit 1: (Record, pp. 779-780.) On reading this exhibit remember that Taylor had received Bancroft's report on February 20, 1919, showing about 8100 tons of ore developed. On February 24, with the knowledge of the then small tonnage, Taylor writes this exhibit, containing a new proposition, in which he says: "means that you would be willing to give me one-half interest in the mine" (the context shows he means stock) "for liquidating your present indebtedness." It is thus demonstrated that with the knowledge that there were about 8100 tons of ore developed in the mine Taylor was willing to enter into an arrangement whereunder he was to provide money for the payment of the debts for one-half of the stock of the company.

Exhibit 12: (Record, pp. 797-800.): Taylor writes to Friedman March 25th, urging Friedman to come to Denver. He says:

> "Bancroft * * * will not return to Denver until April 1. * * * In order to work in with Bancroft's proposition, I suggest that Poole come to Denver during the first week in April, bringing exact data as to development work, assays, etc., so that he and Bancroft together can work up a definite tonnage statement of the present ore development. * * * If you cannot come, would your stockholders be willing to have Nenzel, Poole and Murrish appointed as a joint committee to represent them in readjusting the option. * * * The general basis of readjustment which I have in mind is some basis on which cash be furnished for the liquidation for all of the company's indebtedness plus my ability to acquire the stock

> or 75 per cent of it on a basis of paying for the stock out of the future earnings."

It is thus demonstrated that, without any knowledge of actual ore development, Taylor was proposing to enter into an arrangement whereby he would take 75 per cent. of the stock for obtaining the funds with which to pay off the debts. If it be argued that this suggestion was conditioned upon the tonnage which Poole and Bancroft were to work up together, the next exhibit will show that this was not the fact.

Exhibit 52 (Record, p. 891) (Note that on March 28, 1919, Nenzel had wired Taylor that Murrish, Poole and himself would leave the following day, arriving in Denver Sunday next. Exhibit 14):

On March 28 Taylor wired the Nevada Humboldt Tungsten Mines Company from Denver:

> "Bancroft plans changed. * * * He may or may not come back via Denver. *However, do not believe his presence necessary* for proposed conference. Would be glad to see Messrs. Poole, Murrish and Nenzel."

This shows that Taylor was ready to enter into a contract without having Poole and Bancroft together to work up a tonnage statement.

Note the significant fact that now that Taylor has abandoned the idea of having Poole and Bancroft together to work up a tonnage statement, he makes no further suggestion in this telegram that Mur-

rish, Poole and Nenzel are nevertheless to bring on the data, which, according to his letter of March 25th, was to have been only for Bancroft's use.

Now, this brings us to Taylor's own testimony as to his state of mind when he first met these parties in Denver on Sunday. *Was Taylor on that day, and prior to any alleged representations as to tonnage, ready to enter into the contract upon substantially the terms that were ultimately agreed upon?*

> "Q. Was anything said on that Sunday with regard to the quantity of ore in the mine?
> "A. I can't tell you exactly, except the condition of the mine looked very good.
> "Q. And that is all that you recall was said on that Sunday?
> "A. I don't recall particularly what was said on that day.
> "Q. Can you give us the substance of what you said as to what you were willing to do on that Sunday?
> "A. *I was willing in a general way at that time to make a contract according to the terms that were finally arranged.*
> "Q. Did you say that?
> "A. I don't remember whether I did or not."
>
> (Record, pp. 117, 118.)

We submit that from the foregoing exhibits and testimony the conclusion follows that no representation as to tonnage was an inducing cause for entering into the contract of April 2nd. Certainly, the testimony that it was an inducing cause is too vague and uncertain to justify a conclusion that

representations as to tonnage were an inducing cause.

In re Hawks, 204 Fed. 314, 316;
United States v. Southern Pacific Co., 260 Fed. 511, 520.

The state of mind under which he entered into the agreement of April 2d at Denver was not induced by any representations as to tonnage made there. As soon as he had obtained his contract, however, he immediately wired Bancroft, showing he intended always to rely on him in the expenditure of any money under it. The evidence of how completely he carried out this plan, not expending more than about $250 without it, is completely covered by the briefs in behalf of the other appellees, and need not be reviewed by us.

Appellant has Plain, Speedy and Adequate Remedy in the Ordinary Course of Law.

There is no attempt in appellant's reply brief, nor was any attempt made at the trial, to introduce evidence to show that plaintiff has not a plain, speedy and adequate remedy in the ordinary course of law. He has actually gone to law as the record in No. 2263 shows. He has there stated under oath what his alleged damages are. His counsel have cited a great many authorities upon the measure of damages in such cases. He relies strongly upon the case of *Dotson v. Milliken*, 209 U. S. 237; 52 L. Ed.

768, a case which shows that the measure of damages in such cases is the amount of value of that which the broker was to receive for his services.

While Taylor's complaint in the present action alleges that the stock is of uncertain value, it is denied by Loring and Taylor has offered no proofs. There is no evidence in the record to support the allegation. There is, moreover, uncontradicted evidence in this case that Mr. Loring's contract is being fulfilled, and *it is obvious therefore that the value of the shares of stock can be readily ascertained.*

There is no pretense that there is anything wrong or fraudulent about Mr. Loring's contract. Mr. Loring agreed to give $333,333.33 for the property on the very day that David Taylor filed a complaint in which he had sworn that the corporation was insolvent; that its debts exceeded the value of its assets by about $100,000. And it therefore appears that the price paid was not only an adequate one under the circumstances, but placed in the treasury of the corporation a surplus of about $133,333.33, making the value of the shares of stock of the corporation a matter of easy and definite computation. See particularly

Ellis v. Treat, 236 Fed. 124,

a case on appeal in this Ninth Circuit.

Taylor's Demand Is Unconscionable and Equity Will Never Enforce an Unconscionable Demand.

With reference to appellant's closing suggestion concerning the jurisdiction of a court of equity in his reply brief, it is sufficient to say that if all that Taylor claims is true, the evidence shows that he devoted a few days' time and expended less than $250 on the faith of his contract before he determined to act upon the advice of an independent investigator. He certainly did not spend a day or a dollar after he talked with Mr. Thane on the train, upon the faith of Poole's alleged representations. He determined to have an independent investigation of the property made before he would advance any money on the deal. Without his own advances, it cannot even be pretended that he was ever in a position or able to perform the contract. For this trifling outlay of time and money which he claims to have made upon the faith of Poole's alleged representations, he would have this Court place him in possession of 62 per cent. of the stock of these corporations.

Nothing of value or benefit ever came to the corporations, or their stockholders, through Taylor's efforts under his contract of April 2, 1919. They have not benefited to the extent of a single dollar by anything that Taylor did or expended under that contract.

Taylor has made his business profit out of the corporation under his sales contract of January,

1919, and months before this suit was brought had been paid every dollar of any balance owed him under that contract. (When on March 10, they had sorely needed $15,000 and asked accommodation of sight draft as against carload of concentrates about to be shipped (Record, p. 789), he refused it.)

Mr. Loring's purchase has not only paid off all the debts of the corporations, but leaves available assets in their hands amounting to $133,333.33, 62 per cent. of that net amount is $82,666.66. This would be an unconscionable return to Taylor for any services rendered by him or any outlays made by him upon the faith of Poole's alleged representations.

In some jurisdictions it is held that mere inadequacy of consideration will not defeat specific performance of a contract. But such is not the universal rule. It is not the rule in California, nor is it the rule in the United States Courts. On the contrary, the rule prevailing in the United States Courts is that where the consideration is so grossly disproportionate as to make the bargain unconscionable, equity will refuse aid.

> "The purchaser, Cromwell, stands in no better position. He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of $30,000 worth of stock for which he paid only $50. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the plaintiff to his

remedy at law. This has so often been held on bills for specific performance, and in other analogous cases, that it is unnecessary to spend argument on the subject."

Miss. & M. R. R. Co. v. Cromwell, 91 U. S. 643, 645.

The case of *Camp v. Boyd,* cited by appellant, is not in point either on its facts found or on the situation presented by the record. The case at bar is not an appeal from a decision of a Court of equity which is assuming that relief is due the complainant on the merits and where the only question is how the relief shall be given. On the contrary, the appeal in the case at bar is from the decision of a Court of equity which has found from the evidence heard in open court that the complainant's allegations of fraud, misrepresentation and reliance thereon are without merit, and that he is not entitled to any relief because he has no case on the merits.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
November 30, 1923.

Respectfully submitted,
John F. Davis,
Charles S. Wheeler, Jr.,
Attorneys for Appellee W. J. Loring.